

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DONALD RICHARD MCFADDEN,

Case No. 2:20-cv-00374-GMN-BNW

Petitioner,

ORDER

v.

BRIAN WILLIAMS, SR, et al.,

Respondents.

Before the court is respondents' motion to dismiss certain claims in Donald McFadden's pro se 28 U.S.C. § 2254 habeas corpus petition as unexhausted (ECF No. 9). The court has reviewed the claims at issue and concludes that they are unexhausted.

I. Background & Procedural History

In August 2015, McFadden pleaded guilty to trafficking in a controlled substance (exhibit 7).¹ The state district adjudicated him a habitual offender and sentenced him to a term of 10 to 25 years. Exh. 14. Judgment of conviction was filed on March 15, 2016. Exh. 15.

McFadden filed an untimely appeal. The Nevada Supreme Court ordered McFadden to show cause why the appeal should not be dismissed for lack of

¹ Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 9, and are found at ECF Nos. 11-13.

1 jurisdiction. McFadden never responded, and the Nevada Supreme Court dismissed his
2 appeal. Exh. 24.

3 The Nevada Court of Appeals affirmed the denial of McFadden's state
4 postconviction petition in part. Exh. 45. The court reversed and remanded for an
5 evidentiary hearing on McFadden's claim that his counsel was ineffective for failing to
6 pursue a direct appeal despite McFadden's request for an appeal. *Id.* at 6. After an
7 evidentiary hearing, the state district court denied the claim. Exh. 52. The Nevada Court
8 of Appeals affirmed the denial. Exh. 70.

9 McFadden dispatched his federal habeas corpus petition for filing in January 2020
10 (ECF No. 6). Respondents now move to dismiss several claims on the basis that they
11 are unexhausted (ECF No. 9). McFadden has not opposed the motion to dismiss or
12 responded in any way. Local Rule 7-2(d) provides that generally the failure of an opposing
13 party to file points and authorities in response to a motion constitutes a consent to the
14 granting of the motion.

15 II. Legal Standards & Analysis

16 a. Exhaustion

17 A federal court will not grant a state prisoner's petition for habeas relief until the
18 prisoner has exhausted his available state remedies for all claims raised. *Rose v.*
19 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state
20 courts a fair opportunity to act on each of his claims before he presents those claims in
21 a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also*
22 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the
23 petitioner has given the highest available state court the opportunity to consider the
24 claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,
25 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir.
26 1981).

27 A habeas petitioner must "present the state courts with the same claim he urges
28 upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal

1 constitutional implications of a claim, not just issues of state law, must have been raised
 2 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481
 3 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276). To achieve exhaustion, the state court
 4 must be “alerted to the fact that the prisoner [is] asserting claims under the United
 5 States Constitution” and given the opportunity to correct alleged violations of the
 6 prisoner’s federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); see *Hiivala v.*
 7 *Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b)
 8 “provides a simple and clear instruction to potential litigants: before you bring any claims
 9 to federal court, be sure that you first have taken each one to state court.” *Jiminez v.*
 10 *Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 520
 11 (1982)). “[G]eneral appeals to broad constitutional principles, such as due process,
 12 equal protection, and the right to a fair trial, are insufficient to establish exhaustion.”
 13 *Hiivala*, 195 F.3d at 1106. However, citation to state case law that applies federal
 14 constitutional principles will suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir.
 15 2003) (en banc).

16 A claim is not exhausted unless the petitioner has presented to the state court
 17 the same operative facts and legal theory upon which his federal habeas claim is based.
 18 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The
 19 exhaustion requirement is not met when the petitioner presents to the federal court facts
 20 or evidence which place the claim in a significantly different posture than it was in the
 21 state courts, or where different facts are presented at the federal level to support the
 22 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge*
 23 *v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455,
 24 458 (D. Nev. 1984).

25 **b. Ground 1(d)**

26 McFadden alleges that his plea counsel was ineffective when he failed to explore
 27 all defenses in mitigation of the habitual adjudication in violation of his Sixth Amendment
 28 rights (ECF No. 6, p. 4). Respondents are correct that McFadden did not present this

1 claim to the state district court or state appellate court (ECF No. 9; see exhs. 26, 38,
2 58). Ground 1(d), therefore, is unexhausted.

3 **c. Ground 1(e)**

4 McFadden contends that his counsel was ineffective because he was
5 disorganized and cursory during the penalty phase (ECF No. 6, p. 4). McFadden did not
6 present this claim to the state district court or the state appellate court, and it is
7 unexhausted. See exhs. 26, 38, 58.

8 **d. Ground 1(f)**

9 McFadden contends that his counsel was ineffective for failing to argue and
10 present evidence that McFadden's conduct was not based upon a criminogenic
11 pathology, but instead a federally recognized disability, drug addiction and substance
12 abuse (ECF No. 6, p. 4).

13 McFadden argued in his opening brief to the Nevada Court of Appeals after
14 remand of his state postconviction petition that the failure to appear clause in his guilty
15 plea agreement was unconscionable because the habitual criminal enhancement was
16 being applied him, an individual suffering from a controlled substance addiction. Exh.
17 58, pp. 38-39. The Nevada Court of Appeals declined to consider this issue on appeal
18 because McFadden did not initially raise this claim before the state district court. Exh.
19 70, pp. 2-3. Because ground 1(f) was presented for the first time before the Nevada
20 Court of Appeals, it was presented in a procedurally deficient manner and is therefore
21 unexhausted. See *Castille v. Peoples*, 489 U.S. 346 (1989); see also exhs. 26, 38.

22 **e. Ground 1(g)**

23 McFadden asserts that his counsel was ineffective for failing to argue against the
24 habitual criminal enhancement based on diminished capacity (ECF No. 6, pp. 4-5).
25 McFadden did not present ground 1(g) to the state district court or the state appellate
26 court, thus it is unexhausted. See exhs. 26, 38, 58.

1 **f. Ground 1(h)**

2 McFadden argues that his counsel was ineffective for failing to present empirical
3 data and an expert at sentencing to show that McFadden had a diminished capacity due
4 to methamphetamine intoxication and a mental health/disorder defense (ECF No. 6, p.
5 5). Federal ground 1(h) was not presented to the state district court or state appellate
6 court; it is unexhausted. See exhs. 26, 38, 58.

7 **g. Ground 1(j)**

8 McFadden contends that he was not enrolled in a substance abuse diversion
9 program as a result of his counsel's ineffective assistance (ECF No. 6, p. 5). He did not
10 raise this claim in the state district court or state appellate court. Federal ground 1(j) is
11 unexhausted.

12 **III. Petitioner's Options Regarding Unexhausted Claims**

13 A federal court may not entertain a habeas petition unless the petitioner has
14 exhausted available and adequate state court remedies with respect to all claims in the
15 petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A "mixed" petition containing both
16 exhausted and unexhausted claims is subject to dismissal. *Id.* In the instant case, the
17 court concludes that the following claims are unexhausted: ground 1(d), 1(e), 1(f), 1(g),
18 1(h), and 1(j). Because the court finds that the petition contains unexhausted claims,
19 petitioner has these options:

20 1. He may submit a sworn declaration voluntarily abandoning
21 the unexhausted claims in his federal habeas petition, and proceed only
22 on the exhausted claims;

23 2. He may return to state court to exhaust his unexhausted
24 claims, in which case his federal habeas petition will be denied without
prejudice; or

25 3. He may file a motion asking this court to stay and abey his
26 exhausted federal habeas claims while he returns to state court to exhaust
his unexhausted claims.

1 With respect to the third option, a district court has discretion to stay a petition
 2 that it may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276, (2005).
 3 The *Rhines* Court stated:

4 [S]tay and abeyance should be available only in limited circumstances.
 5 Because granting a stay effectively excuses a petitioner's failure to
 6 present his claims first to the state courts, stay and abeyance is only
 7 appropriate when the district court determines there was good cause for
 8 the petitioner's failure to exhaust his claims first in state court. Moreover,
 9 even if a petitioner had good cause for that failure, the district court would
 10 abuse its discretion if it were to grant him a stay when his unexhausted
 claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application
 for a writ of habeas corpus may be denied on the merits, notwithstanding
 the failure of the applicant to exhaust the remedies available in the courts
 of the State").

11 *Rhines*, 544 U.S. at 277.

12 If petitioner wishes to ask for a stay, he must file a motion for stay and abeyance
 13 in which he demonstrates good cause for his failure to exhaust his unexhausted claims
 14 in state court and presents argument regarding the question of whether his
 15 unexhausted claims are plainly meritless. Respondents would then be granted an
 16 opportunity to respond, and petitioner to reply. Or petitioner may file a declaration
 17 voluntarily abandoning his unexhausted claims, as described above.

18 Petitioner's failure to choose any of the three options listed above, or seek other
 19 appropriate relief from this court, will result in his federal habeas petition being
 20 dismissed. Petitioner is advised to familiarize himself with the limitations periods for
 21 filing federal habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations
 22 periods may have a direct and substantial effect on whatever choice he makes
 23 regarding his petition.

24 **IV. Conclusion**

25 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 9)
 26 is **GRANTED** as follows:

27 Ground 1(d), 1(e), 1(f), 1(g), 1(h) and 1(j) are UNEXHAUSTED.
 28

1 **IT IS FURTHER ORDERED** that petitioner has **30 days** to either: (1) inform this
2 court in a sworn declaration that he wishes to formally and forever abandon the
3 unexhausted grounds for relief in his federal habeas petition and proceed on the
4 exhausted grounds; OR (2) inform this court in a sworn declaration that he wishes to
5 dismiss this petition without prejudice in order to return to state court to exhaust his
6 unexhausted claims; OR (3) file a motion for a stay and abeyance, asking this court to
7 hold his exhausted claims in abeyance while he returns to state court to exhaust his
8 unexhausted claims. If petitioner chooses to file a motion for a stay and abeyance, or
9 seek other appropriate relief, respondents may respond to such motion as provided in
10 Local Rule 7-2.

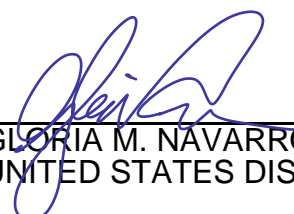
11 **IT IS FURTHER ORDERED** that if petitioner elects to abandon his unexhausted
12 grounds, respondents have **30 days** from the date petitioner serves his declaration of
13 abandonment in which to file an answer to petitioner's remaining grounds for relief. The
14 answer should contain all substantive and procedural arguments as to all surviving
15 grounds of the petition and comply with Rule 5 of the Rules Governing Proceedings in
16 the United States District Courts under 28 U.S.C. §2254.

17 **IT IS FURTHER ORDERED** that petitioner has **30 days** following service of
18 respondents' answer in which to file a reply.

19 **IT IS FURTHER ORDERED** that if petitioner fails to respond to this order within
20 the time permitted, this case may be dismissed.

21 **IT IS FURTHER ORDERED** that respondents' motion to extend time to file
22 exhibits in support of the motion to dismiss (ECF No. 10) is **GRANTED** *nunc pro tunc*.
23

24 DATED: 24 February 2021.

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27 _____
28 GLORIA M. NAVARRO
 UNITED STATES DISTRICT JUDGE